IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 726 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

THAKORBHAI MEGHJIBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 726 of 2004

MR SHAKEEL A QURESHI for Petitioner No. 1

MR BHATT, APP for Respondent No. 1

MR CR ABICHANDANI for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 18/03/2004

ORAL JUDGEMENT

Heard Mr. Shakeel A. Qureshi for the petitioner/original complainant, learned APP Mr. Bhatt

for respondent No.1 and learned counsel Mr. C.R.Abichandani appearing for respondent Nos. 2 & 3 for final disposal.

2. The present application is preferred for challenging the order dated 31.12.2003 passed by the learned Sessions Judge, Surat, whereby, after the remand ordered by this Court, the bail application is once again allowed.

3. The short facts of the case are that one Mukesh Vaghani and respondent Nos. 2 & 3 are the accused under Sections 302, 504, 114 of IPC read with Section 115 of BP Act for causing death of Manoj. As per prosecution case on 5.2.2003 when the complainant was passing through Anuradha society for the work of the marriage of his sister, Ashok Vagani was going away in haste to the society and Ashok Vagani told to complainant that complainant may get his Monia (Manoj) in hospital since Ashok Vagani had beaten him while Manoj had come to quarrel at Ashok Vagani's office. Thereafter complainant found his nephew Manoj alias Monia with full blood and he was injured on chest and back side of body. The friend of Manoj named vijay told complainant that he (Vijay) and Manoj had come to Ashok Vagani's office for compromising dispute with Umesh and at that time Ashok Vagani, his brother Mukesh Vagani and one Bharat had abused Manoj and by catching hold at steps of office all the three have assaulted with sticks and have caused injury with knife. Thereafter, Manoj was carried to hospital and he was declared dead. As per statement of witnesses, when deceased Manoj was running away from office of the accused Ashok Vagani, all the three accused run behind accused, attacked and caused injury to Manoj. As per prosecution case, accused Mukesh had given knife blow, accused Ashok Vaghani had given stick (Danda) blow and Bharat Savani had given blow with iron rod. As per P.M. report there are more than six multiple injuries. After the arrest, bail application was submitted by respondent No.2 before the learned Sessions Judge being Criminal Application No. 307 of 2003. The learned Sessions Judge (Mr. M.D.Shah), after considering the police papers and the statements of witnesses had prima facie found that the accused has caused injury and there was the only intention to cause death. The learned Sessions Judge also found that knife blow was given by Mukesh Vaghani, Ashok Vaghani had given two blows with stick (Danda) on the back side of the neck and on the back side of the body of the deceased and the learned Sessions Judge had also observed that the accused has the past history of involvement in the other offence and there was also

detention under PASA and therefore, the learned Sessions Judge found not to release the accused on bail in the serious offence of murder. Similar bail application being Criminal Application No. 449 of 2003 was preferred by respondent No.3 which also came to be rejected by the same learned Sessions Judge.

4. Thereafter, it appears that charge sheet was filed and bail application was submitted by respondent Nos. 2 & 3. The said bail application was considered by the subsequent learned Sessions Judge (Ms. K.M.Vin) and after recording the submissions of the learned counsel appearing for both the sides, at para 6, without recording reasons for considering the prima facie aspects of the case, the powers were exercised by the learned Sessions Judge for releasing both the accused on bail. It is pertinent to note that one of the condition was not to give threat or to win over the witness of the complainant side. The aforesaid order dated 29.5.2003 passed by the learned Sessions Judge in Criminal Application No. 680 of 2003 was challenged by the State in Criminal Misc. Application No. 4546 of 2003 and the same came to be disposed of as per the judgement dated 16.12.2003 by this Court. While considering the legality and validity of the aforesaid order dated 29.5.2003 passed by the learned Sessions Judge it was observed by this Court at para 4 which reads as under:

"It appears that the learned Sessions Judge has committed not only ex facie error, but the learned Sessions Judge in the matter for considering the bail application for the serious offences under Section 302 has exercised the judicial discretion without considering the material at all on the question of prima facie involvement of the accused. It is true that whether the presence of the accused will be secured or whether the accused are likely to jump the bail or run away are also relevant considerations, but it is now well-settled in a serious offence where the punishment is of death or life-imprisonment and when the alleged offence is under Section 302 of IPC, the Court while considering the matter for bail is also required to consider as to whether there is any prima facie case of the prosecution against the accused concerned or not. The prima facie involvement of the accused concerned in serious offence is one of the major and important aspect which was required to be considered and there is no discussion on the said aspect including that

> there are injured eye-witnesses. I find it proper to leave the matter at that stage, except observing that the order of the learned Sessions Judge is vulnerable on the face of it since no reasons whatsoever are recorded by the learned Sessions Judge for examining the case for consideration of bail keeping in view the prima facie involvement of the accused in the serious offence under Section 302 of IPC or not. Therefore, I find that the order of the learned Sessions Judge deserves to be quashed only on the said ground."

As per the aforesaid decision of this Court, since it was found by the Court that there was no proper application of mind to the relevant aspects of the case, the order passed by the learned Sessions Judge was quashed and set aside with the directions to the leaned Sessions Judge to decide the bail application afresh in light of the observations made by this Court in the said judgement, and until the matter is reconsidered by the learned Sessions Judge, the marking of the presence was ordered and the other conditions as per the order was continued by way of status quo.

5. It appears that the matter was once again considered by the same learned Sessions Judge (Ms. K.M.Vin). However, the pertinent aspect is that in the said proceedings before the learned Sessions Judge, the original complainant had filed the affidavit, copy whereof is produced at page 59. The affidavit also came to be filed on 30.12.2003 by one witness namely Salim Dadubhai who is a vegetable lauri merchant stating a different story than stated in the statement before police. The same Salim Dadubhai is one of the eye witnesses. The learned Sessions Judge ultimately, passed the order on 31.12.2003 whereby the bail is granted to both the accused more or less on the same conditions as they were in the order dated 29.5.2003 and it is under these circumstances, the original complainant has approached this Court by the present petition.

6. It is well settled that granting of bail is a discretionary order and unless it is demonstrated or found by this Court that discretion is perversely exercised or there are cogent circumstances not to warrant bail, normally this Court would not interfere in the matter where the learned Sessions Judge has released the accused on bail. It is required to be noted that the offence is a serious offence under Section 302 of IPC and the accused of the offence under Section 302 of IPC for

the purpose of considering the matter for bail would not stand on the same footing in comparison to the accused of the offence where the punishment is less than 10 years. It is also well settled that while considering the matter for bail in the serious offence under Section 302, the Court has to consider the prima facie aspects generally and it will not be necessary for the Court to have the microscopic examination of facts. In the present case there are three eye witnesses of the offence. One is Vijay, another is Dharmesh and the third is Salim Dadu. If the matter is considered as per the prosecution case keeping in view the statement recorded of the eye witness, the then learned Sessions Judge who has considered the matter while passing the order on 11.3.2003 in Criminal Application No. 307 of 2003 and order passed in Criminal application No. 449 of 2003 had rightly exercised the discretion of not releasing the accused concerned including the respondent Nos. 2 & 3 on bail. Of course, at the relevant point of time, the charge sheet was not filed and possibly, the matter can be considered, after the investigation is over, afresh for exercising a discretion for bail after the charge sheet. Even if it is considered that filing of the charge sheet and the completion of the investigation may be one of the relevant change in circumstances for reconsideration of the matter for bail, the question of prima facie aspects in the serious offence under Section 302 cannot be ignored. Inspite of the said aspects expressly given emphasis on the question of prima facie case by this Court in its judgement dated 16.12.2003 as referred to in para 4 which has been reproduced earlier, it appears that the learned Sessions Judge has not at all taken care to consider the aspects as to why the discretion should not be exercised in the same manner as it was considered by earlier learned Sessions Judge who passed the order on 11.3.2003. There is no special circumstances recorded or additional material considered by the learned Sessions Judge after considering the observations made in the earlier order dated 11.3.2003 warranting to make departure from the materials earlier considered by the learned Sessions Judge in the order dated 11.3.2003.

7. Further, in the impugned order, the learned Sessions Judge has not at all taken care to consider the antecedent and criminal background of the accused and more particularly respondent No.2. Once it has come on record that the respondent No.2 came to be detained under PASA on account of the offences registered against him on allegations of extortion of money and others, the said aspects could not have been ignored while exercising the

judicial discretion of releasing the accused on bail.

8. Not only that but the affidavit filed by the original complainant before the learned Sessions Judge is not at all referred nor it is considered for the purpose of primafacie considering the past criminal background of one of the accused respondent No.2 herein, that is Ashokbhai Nanjibhai Vaghani. A perusal of the said affidavit filed by the original complainant before the learned Magistrate shows that the respondent No.2 is involved in the offences; (i) under Sections 387, 506(2), 120B, 451, 423 of IPC vide CR No. 427/1999 of Umra Police Station on the allegation that he is one of the member of gang of O.P.Singh and Chhota Rajan, (ii) for the offences under Sections 365, 114 of IPC vide CR No. 374/1999 of Vracha Police Station on the allegation of kidnapping of Himansu Panchal and getting document signed by physical pressure, and (iii) offence under Section 387, 506, 120B, 451, 323 of IPC and offence under Section 25C of Arms Act vide CR No. 218/1999 of Athva Police Station for the allegation of kidnapping of Tarun Raval and demanding ransom of Rs.80 lacs. If the details of those three criminal cases in which the involvement is considered, it can be said that respondent No.2 is having a criminal background for involvement in the serious offences and had the learned Sessions Judge considered the said aspects, the discretion would not have been exercised by the learned Sessions Judge for releasing in any case respondent No.2 on bail. Had the matter rested there, possibly, it could be viewed differently, but in the present case there is a cogent circumstance of allegation of winning over of one of the eye witness Salim Dadu. The learned Sessions Judge has only considered that the said witnesses can be chance witnesses and the affidavit is referred to but the learned Sessions Judge has not considered the aspects that the filing of the affidavit by such an eye witness declaring the statement contrary to the statement made before the police, prima facie shows the tempering of the crucial witnesses. In view of the past criminal back ground of one of the accused, it was required for the learned Sessions Judge to consider the aspects of tempering of the witness while exercising discretion for releasing on bail.

9. In view of the aforesaid discussion, it appears that while passing the order dated 31.12.2003, the learned Sessions Judge has exercised the discretion by ignoring the material which would warrant rejection of the bail application and even the cogent circumstances in this regard, more particularly, the circumstances which

were recorded by the learned Sessions Judge earlier while passing the order on 11.3.2003 on the question of prima facie of the prosecution against the accused. Even otherwise also when as per prosecution case prima facie case is found for involvement of accused in serious offences punishable with life imprisonment or death, coupled with circumstances of three eye witness including injured witness, it would not be a case to exercise discretion to release such accused on bail. I would have dealt with each and every piece of prosecution case to conclude prima facie involvement of accused, however, any further observation by this Court may prejudice the defence of the of the accused at the trial and therefore, I have refrained myself from making such observation and recording such finding. Suffice it to say that there is prima facie involvement of the respondent Nos. 2 and 3.

10. Mr. Abichandani for the respondent Nos. 2 & 3 has relied upon the decision of this Court in case of Mahipathsinh Panchaji Jadeja v. State of Gujarat, 1990(2) GLR page 856 to contend that the affidavit should not be considered so long as the investigating agency has not been given an opportunity to verify the contents of the affidavit and the affidavit could be a voluntary statement. In the said judgement, at para 5, the Court found that a bare reading of the affidavit needs an impression that the deponent of such affidavit do not appear to be any more in the mood either to prosecute, try and/or to get convicted and punished the accused for the alleged offences, and therefore, in that context the observations are made. At para 8 of the said decision, ultimately, the Court did not accede to the request to consider two unverified affidavits of the deponent. In the present case, the filing of affidavit by one eye witness is with additional circumstance of the past criminal record of respondent No.2, and therefore, in my view, considering the facts and circumstances of the case, said decision is no help to the petitioner. Mr. Abichandani also relied upon one decision of Rajasthan High Court in case of Jaichand v. State of Rajasthan reported at 1991 (3) R.L.R. page 63 for contending that the past criminal record is no ground to deny the bail. With respect, I am unable to agree with the view expressed in the said decision. Further what is the nature of the past background and the seriousness of the offences in which the accused are involved would vary from facts to facts.

11. Mr. Abichandani has relied upon the following decisions;

(i) Dolat Ram & Ors. v. State of Haryana, 1995 Cr.L.R. (SC) 81 for contending that bail once granted cannot be cancelled without specific grounds. However, as observed earlier there are specific grounds found by this Court hence the said decision is of no help to respondent Nos. 2 & 3.

(ii) The State through Delhi Administration v/s Sanjay Gandhi, AIR 1978 SC 961 for contending that there must be material to connect accused with witness who is allegedly tempered. In the present case the learned Sessions Judge has not at all considered the said aspect. Further tempering of witness is with past criminal background and prima facie involvement in offence U/s 302 and therefore the said decision would not apply to the present case.

(iii) Bhagirathsinh Judeja v. State of Gujarat, AIR 1984 SC 372 for contending that for cancellation of bail the consideration would be different. In the present case considering the facts and circumstances the accused has past criminal background and one eye witness is tempered shows that the accused is likely to abuse the discretion. Hence the said decision is of no help to respondent Nos. 2 & 3.

(iv) Parsottam Manilal Patel v. Dwarkabhai Mohanbhai Patel and Others, 1994 (1) GLH (UJ) 7 for contending that mere involvement of serious offence is no ground for cancelling the bail. In the present case there are additional circumstances for cancellation and they are that earlier bail not granted, past criminal background and tempering of witness. Hence the said decision would not apply to present case.

(v) Rankanidhi Panda v. State of Orissa and Others, 1997 CRI.L.J. 4217 (Orrisa High Court) to contend that there must be material for showing that parties have misused the bail. In the very decision at para-5 it has been observed that the bail can be cancelled if it was illegal or improper or arbitrary exercise of discretion. Therefore, the said decision is of no help to respondent Nos. 2 & 3.

(vi) Bhola Nath Das v. State and another, 1991 CRI.L.J. 1422 (Calcutta High Court) for

contending that unless there are violation of conditions, the bail cannot be cancelled. In the said decision at para-24 it has been observed by the Court that there is no material before the Court for prima facie case. In the present case there is material hence the said decision would not apply.

(x) Mahant Chand Nath Yogi and another v. State of Haryana, (2003) 1 SCC 326 for contending that there should be cogent and overwhelming grounds for cancellation of bail. As observed earlier there are cogent and overwhelming grounds hence the said decision supports the complainant.

Under the above circumstances, the decisions referred to, even if are considered and the principles are accepted, in my view the same would not be of any help to the respondent Nos. 2 & 3 and on the contrary, as observed earlier, since it is demonstrated that the cogent circumstances ex facie are not considered by the learned Sessions Judge and if such circumstances are considered, it would not be a case to exercise the discretion for releasing on bail. Under the above circumstances it appears that the learned Sessions Judge while granting bail to Respondent No.2 and 3 has exercised discretion arbitrarily and discretion exercised is perverse to record of the case. Further, there are cogent and overwhelming circumstances to interfere with the impugned order passed by the learned Sessions Judge.

12. However, the further aspects deserves consideration is regarding cancellation of bail for respondent No.2 and 3 separately. There is common cogent circumstances for prima facie involvement of both the said accused, but at the same time, if the criminal background is considered it appears that there is no material with this Court nor was before the learned Sessions Judge for respondent No.3. In my view the antecedent of the accused would also be relevant circumstance while exercising discretion for bail. As such, normal condition while releasing any accused on bail is that he shall not involve himself in any illegal activities which would include offences. The major purpose of the bail is to protect the liberty of citizen but such liberty should not be to the extent that it becomes danger to the society or to public. Though accused no.2 is involved in past serious offences referred to herein above, he at the relevant point of time has been released on bail and since he was released

by Courts, State made an attempt to detain under PASA. It is true that he has been released thereafter from detention but the aforesaid three criminal cases of serious offences are pending even today. As such, they were pending, even though while continuing on bail in respect to earlier three serious offences, the respondent no.2 is involved in once again serious offence U/s 302 of murder. Under the circumstances in any case respondent No.2 cannot be allowed to be released or continued on bail more particularly when the same is coupled with allegation of tempering one of the eye witnesses. As there is no such extraordinary past criminal background and pendency of serious criminal cases against respondent No.3 some leniency can be shown to respondent No.3 for continuing on bail by imposing strict conditions. However, so far as respondent No.2 is concerned, there are cogent and overwhelming circumstances to cancel the bail.

13. In view of the aforesaid, the order dated 31.12.2003 passed by the learned Sessions Judge in Criminal Misc. Application No. 680 of 2003 for releasing the respondent Nos. 2 is quashed in toto. So far as respondent No.3 is concerned, he shall be allowed to be continued on bail with the further conditions that;

(i) he shall not enter the limits of Surat District without prior permission of the investigating officer or for marking presence and for attending trial.

(ii) he shall report to inquiry officer, the place at which he is going to stay outside Surat District.

The aforesaid conditions shall be in addition to conditions Nos. 1 to 4 which are ordered by the learned Sessions Judge for releasing respondent No.3 on bail.

14. The rule is made absolute to the aforesaid extent. Considering the facts and circumstances of the case, no cost.

15. Mr. Abichandani appearing for respondent Nos. 2 & 3 requested that the operation of the decision be suspended for some time qua respondent No.2 with a view to enable respondent No.2 to approach before the higher forum. Considering the facts and circumstances of the case and more particularly in view of the reasons recorded by this Court earlier, I am not inclined to accept the said request and hence rejected. D.S.

(Jayant Patel,J)

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